

**Thinking Outside of the “Detained” Box:  
A Guide to Temporary Seizures of Property Under the Fourth Amendment**

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**I. Introduction**

Captain (CPT) Virgil, a company commander, suspected one of his Soldiers, Specialist (SPC) Stoecker, of stealing electronic equipment from a unit warehouse.<sup>1</sup> As a result, CPT Virgil spoke with a military police investigator (MPI) and requested his assistance.<sup>2</sup> After meeting with the MPI, SPC Stoecker consented to a search of his barracks room in an attempt to locate the missing equipment.<sup>3</sup> Specialist Stoecker even assisted in the search of his barracks room, as he stood on a chair, removed boxes from the top of his wall locker, and handed them down to the MPI.<sup>4</sup> As Stoecker moved these boxes, he attempted to covertly slip a small, cigarette-sized, box into his pants pocket.<sup>5</sup> Believing the box might contain proceeds from the sale of the stolen electronic equipment, the MPI intercepted the box, searched it, and discovered that it instead contained a quantity of a green leafy substance that later proved to be marijuana.<sup>6</sup>

In *United States v. Stoecker*, the resulting 1984 Court of Military Appeals (COMA) case, the Government attempted to justify the search of the box on the grounds “that, if left in possession of the box, appellant might destroy or dispose of its contents.”<sup>7</sup> The Government failed to persuade the court that an exigency to search the box existed under these circumstances.<sup>8</sup> The court did, however, provide advice on how the MPI should have proceeded in a similar situation.<sup>9</sup> If Stoecker did not provide consent to search the box, and his commander was unavailable or otherwise disqualified from authorizing the search, the investigator “could have retained custody of the box until he could seek suitable authorization to open it.”<sup>10</sup> This option to temporarily seize property represents the established principle that “[l]aw enforcement authorities

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<sup>1</sup> *United States v. Stoecker*, 17 M.J. 158, 159 (C.M.A. 1984).

<sup>2</sup> *Id.* at 160. Army Regulation (AR) 190-3 explains the role of military police investigators (MPI). See U.S. DEP’T OF ARMY, REG. 190-3, MILITARY POLICE INVESTIGATIONS para. 4-1 (1 Nov. 2005). According to AR 190-3, MPI “fulfill a special need for an investigative element within the military police to investigate many incidents, complaints, and matters not within [United States Army Criminal Investigation Division Command] jurisdiction, but which cannot be resolved immediately through routine military police operations.” *Id.* The U.S. Army Criminal Investigation Division (CID), on the other hand, is “the sole agency within the United States Army responsible for the investigation of felonies,” with some exceptions. U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 1-5 (30 Oct. 1985).

<sup>3</sup> *Stoecker*, 17 M.J. at 160.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 161. During the suppression motion, the MPI stated specifically that he did not believe the box was large enough to contain any of the stolen electrical equipment items he was searching for during the consent search. *Id.*

<sup>7</sup> *Id.* at 164. Typically, the MPI would need an authorization to search the box. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (2008) [hereinafter MCM]. The Military Rules of Evidence (MRE), which are “the rules applicable in courts-martial,” *id.* MIL. R. EVID. 101, define a search authorization as “an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person.” *Id.* MIL. R. EVID. 315(b). Under MRE 315, however, not all searches require a search authorization. According to MRE 315(g),

[a] search warrant or search authorization is not required . . . for a search based upon probable cause when . . . [t]here is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence.

*Id.* MIL. R. EVID. 315(g).

<sup>8</sup> *Stoecker*, 17 M.J. at 164.

<sup>9</sup> *Id.*

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can properly take reasonable measures to assure that, until reasonable investigative steps can be completed, evidence is not destroyed, crime scenes are not disarranged, and suspects do not flee.”<sup>11</sup>

A temporary seizure of property represents a government agent’s tool to maintain the status quo prior to obtaining a search authorization.<sup>12</sup> Military law practitioners must examine Fourth Amendment<sup>13</sup> case law in order to understand and apply the temporary seizure framework.<sup>14</sup> Fortunately, case law shows that temporary seizures are reasonable so long as government agents demonstrate the appropriate level of diligence in light of the property owner’s interest.<sup>15</sup> This primer will assist the military practitioner in analyzing temporary seizures that are based both on reasonable suspicion and probable cause.<sup>16</sup> The first section will discuss temporary seizures that effectively implicate no possessory interest. The second section will examine temporary seizures that implicate a possessory interest. The third section will consider temporary seizures that implicate both a possessory and liberty interest. These three sections will provide a framework for analyzing the constitutionality of virtually every temporary seizure scenario. A concise flowchart appears at the conclusion of this primer to help counsel evaluate temporary seizures of all varieties by moving step-by-step through the necessary analyses.

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<sup>10</sup> *Id.* The court stated that under the circumstances, “[w]e can perceive no problem if [the MPI] had retained the box until he could get authority to examine its contents from a military magistrate or a commander who was not disqualified to authorize a search.” *Id.* According to the MRE, an impartial commander “who has control over the place where the property or person to be searched is situated or found” or an impartial military judge or magistrate has the power to authorize a search or seizure of property if probable cause exists. MCM, *supra* note 7, MIL R. EVID. 315, 316(d)(4)(A).

<sup>11</sup> *Stoecker*, 17 M.J. at 164 (quoting *United States v. Glaze*, 11 M.J. 176, 177 (C.M.A. 1981)).

<sup>12</sup> *See id.* There are a few differences between search warrants and search authorizations. In addition to the fact that military commanders may issue a search authorization, MCM, *supra* note 7, MIL R. EVID. 315, “[a]uthorizations to search and seize or search and apprehend may be issued on the basis of a [sworn or unsworn] written or oral statement, electronic message, or other appropriate means of communication. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 9-8 (16 Nov. 2005). A “search warrant,” on the other hand, “is an express permission to search and seize issued by competent civilian authority.” MCM, *supra* note 7, MIL R. EVID. 315(b). Although a federal magistrate may issue a search warrant based upon a written affidavit, sworn testimony (if reasonable), or by telephonic or other means, the warrant applicant must testify under oath (i.e., all communications must be sworn). FED. R. CRIM. P. 41(d).

<sup>13</sup> The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

<sup>14</sup> The broader Fourth Amendment framework is contained within Justice Harlan’s concurring opinion in *Katz v. United States* where he wrote that a reasonable expectation of privacy exists when a person first “has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Military practitioners must turn to case law for guidance in temporary seizure cases because the MRE fail to provide sufficient assistance on temporary seizures. *See generally* MCM, *supra* note 7, MIL R. EVID. 316. According to MRE 316, a Government agent may seize property if the agent possesses a search authorization, exigent circumstances exist, or the item is in plain view. *Id.* Specifically addressing temporary seizures, MRE 316 only provides that “[n]othing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.” *Id.* In other words, the MREs do not include explicit guidelines concerning temporary seizures, and one must look to Fourth Amendment case law to determine lawfulness of temporary seizures.

<sup>15</sup> *See generally* *United States v. Place*, 462 U.S. 696, 708–09 (1983). The Supreme Court has called reasonableness “the touchstone of the Fourth Amendment.” *United States v. Knights*, 534 U.S. 112, 118 (2001). In finding reasonableness, the Court has stated that it “must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” *Place*, 462 U.S. at 703.

<sup>16</sup> Probable cause exists when “there is reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched.” MCM, *supra* note 7, MIL R. EVID. 315. Understanding the precise meaning of “probable cause” and “reasonable suspicion,” however, may be difficult. In *Ornelas v. United States*, the Supreme Court attempted to explain these concepts when it stated,

Articulating precisely what “reasonable suspicion” and “probable cause” mean is not possible. They are commonsense, nontechnical conceptions that deal with “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” As such, the standards are “not readily, or even usefully, reduced to a neat set of legal rules.” We have described reasonable suspicion simply as “a particularized and objective basis” for suspecting the person stopped of criminal activity and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found . . . . We have cautioned that these two legal principles are not “finely-tuned standards,” comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

517 U.S. 690, 695–96 (1996) (citations omitted).

## II. Temporary Seizures and Three Levels of Interests

When government agents temporarily seize property based upon a reasonable suspicion, this action triggers a responsibility to diligently develop probable cause with regard to the seized property.<sup>17</sup> Once government agents establish probable cause, this accordingly triggers the obligation to diligently pursue an authorization to search the property.<sup>18</sup> Because temporary seizures impact a range of interests for the property owner, the type of interest involved dictates the level of government diligence required in establishing probable cause and obtaining a search authorization.<sup>19</sup> To understand how a temporary seizure's impact on the owner's interest dictates the level of diligence required by the Government, one must examine three seizure scenarios: seizures implicating no possessory interest, seizures implicating a possessory interest, and seizures implicating a possessory and liberty interest.

### A. Temporary Seizures Implicating No Possessory Interest

According to the U.S. Supreme Court, a seizure occurs "when there is some meaningful interference with an individual's possessory interest in that property."<sup>20</sup> Temporary seizures implicate no possessory interest when government agents seize (but do not search) a piece of property that the property owner has already relinquished to a third party, and the owner does not anticipate regaining possession of the property throughout the seizure period.<sup>21</sup> Temporary seizures may implicate no possessory interest in situations where the seizure is based upon a reasonable suspicion<sup>22</sup> and those where the seizure is based upon probable cause.<sup>23</sup>

An example of a case involving a temporary seizure based on reasonable suspicion is *United States v. Van Leeuwen*, where the Supreme Court considered the seizure of packages sent through the postal system.<sup>24</sup> There, after Van Leeuwen dropped off two packages at a Washington state post office, a postal employee notified a police officer that he suspected the two packages—one sent to Tennessee and the other sent to California—contained illegal coins.<sup>25</sup> The officer noticed that the return address matched a vacant housing area and that Van Leeuwen was driving a car with Canadian plates.<sup>26</sup> Based upon their reasonable suspicion, postal employees held the packages while customs officials initiated an investigation that lasted a few hours for the package addressed to California and into the next day for the package addressed to Tennessee.<sup>27</sup> This delay allowed customs officials time to confirm that the package recipients were under investigation for illegal coin trafficking.<sup>28</sup> With probable cause established, the customs officials then obtained a search warrant for both packages twenty-nine hours after the mailing.<sup>29</sup> Van Leeuwen argued that customs officials took too long to obtain a warrant and to search the packages.<sup>30</sup> However, the Court rejected this argument and held that postal employees were justified in holding the packages and that this detention did not invade the property owner's privacy interest.<sup>31</sup>

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<sup>17</sup> See generally *Place*, 462 U.S. at 709.

<sup>18</sup> See generally *United States v. Segura*, 468 U.S. 796, 812 (1984).

<sup>19</sup> See *Place*, 462 U.S. at 705.

<sup>20</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>21</sup> See *United States v. Visser*, 40 M.J. 86, 90 (C.M.A. 1994).

<sup>22</sup> See *United States v. Van Leeuwen*, 397 U.S. 249, 252–53 (1970).

<sup>23</sup> See *United States v. Visser*, 40 M.J. 86, 89–90 (C.M.A. 1994).

<sup>24</sup> *Van Leeuwen*, 397 U.S. at 250.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* "Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime." *Id.*

<sup>28</sup> *Id.* at 250–52.

<sup>29</sup> *Id.* at 253.

<sup>30</sup> *Id.* at 250.

<sup>31</sup> *Id.* at 252–53.

Another example of a temporary seizure implicating no possessory interest is *United States v. Visser*, which involved a seizure based upon probable cause.<sup>32</sup> In this case, the COMA considered a motion to suppress the temporary seizure of an airman's household goods that were in a transit status.<sup>33</sup> Staff Sergeant (SSG) Visser was in the process of shipping his household goods through the on-base Traffic Management Office (TMO) when security police investigators became suspicious that his household goods shipment included boating items stolen from the on-base Morale, Welfare, and Recreation storage lot.<sup>34</sup> The TMO directed the servicing off-post moving and storage company, which had already packed and stored the property pending shipment, to hold Visser's property.<sup>35</sup> The investigators established probable cause during the first day of seizure.<sup>36</sup> One week later, but still within the contractual transportation period, Air Force investigators applied for and received a search warrant from a federal magistrate to search Visser's household goods shipment.<sup>37</sup> During the search, investigators discovered the stolen boating equipment and also found several items of stolen government property.<sup>38</sup> Staff Sergeant Visser contended that the seven-day temporary seizure of his household goods violated the Fourth Amendment.<sup>39</sup> Yet, consistent with *Van Leeuwen*, the court held that Visser failed to demonstrate that the Government interfered with a possessory interest in his household goods throughout the detention period.<sup>40</sup>

Although the courts in *Van Leeuwen* and *Visser* dealt with temporary seizures based upon different levels of suspicion, the Government's ability to maintain the property owner's privacy interest dictated the same result in each case. The Court in *Van Leeuwen* initially acknowledged that the Fourth Amendment provides protection against unreasonable searches of one's papers, and the Court also observed that first-class mail sent through the U.S. postal system is free from inspection.<sup>41</sup> Simultaneously, the Court recognized that temporary seizures of packages in the postal system do not disturb privacy interests, and the duration of the seizure in this particular case did not implicate any other interest.<sup>42</sup> The Court found that the "[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant."<sup>43</sup>

Analyzing a more lengthy temporary seizure based upon probable cause, the court in *Visser* likewise concluded that the accused failed to show "that any possessory interest on his part was interfered with by the detention of his property" during the seizure period.<sup>44</sup> The court determined that SSG Visser had no possessory interest in his property because he had contracted with the Government to transport his household goods throughout the seizure period.<sup>45</sup> Since the accused affirmatively allowed the Government to arrange for the shipment of his household goods, he relinquished any possessory interest in the goods during the transit period and could not then claim that the Government interfered with any interest.<sup>46</sup>

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<sup>32</sup> See *Visser*, 40 M.J. at 90.

<sup>33</sup> *Id.* at 89.

<sup>34</sup> *Id.* at 87-88.

<sup>35</sup> *Id.* at 88.

<sup>36</sup> *Id.* "Here, the detention was initially based on reasonable suspicion which after 1 day evolved into probable cause." *Id.* at 90.

<sup>37</sup> *Id.* at 89-90. Visser "requested in writing that the government transport his household goods at government expense from November 6 to November 14, 1989." *Id.* at 90. The civilian magistrate granted the search warrant on 14 November 1989. *Id.* at 89.

<sup>38</sup> *Id.* At least one of the other pieces of stolen Government property was a straight-back chair. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 90.

<sup>41</sup> *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970).

<sup>42</sup> *Id.* at 253.

<sup>43</sup> *Id.*

<sup>44</sup> *Visser*, 40 M.J. at 90.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* Even assuming the involvement of some possessory interest, Government seizure of one's property may be reasonable where there are justifiable and yet lengthy delays in obtaining a search authorization. See *id.* Although the court in *Visser* found that the accused had no possessory interest in his stored household goods, for argument's sake it took an additional step by considering the lawfulness of the seven-day temporary seizure if the accused did have a possessory interest in that property. *Id.* at 90-91. The court still found this detention lawful because "[t]he Fourth Amendment prohibits only 'meaningful interference' with a person's possessory interests, not Government action which is reasonable under the circumstances." *Id.* at 90. The court noted that while this seven-day delay was much longer than the twenty-nine hour delay in *Van Leeuwen*, the military investigator's delay was justified by the

*Van Leeuwen* and *Visser* demonstrate that as long as a temporary seizure does not include any “meaningful interference with an individual’s possessory interest in that property,”<sup>47</sup> this is not truly a “seizure of property” for Fourth Amendment purposes.<sup>48</sup> If a property owner relinquishes control of a piece of property to a third party, and the government seizure occurs prior to the time when the owner anticipates regaining possession, there is no intrusion on a possessory interest.<sup>49</sup> In the absence of such an intrusion, the courts in both cases declined to articulate the standard of government diligence required when a seizure’s lengthy duration does implicate a possessory interest.<sup>50</sup> While the Court in *Van Leeuwen* hinted that the length of delay could make a temporary seizure unreasonable,<sup>51</sup> in cases where there is no interference with a possessory interest, the government delay in developing probable cause and obtaining a search authorization remains irrelevant.<sup>52</sup>

## B. Temporary Seizures Implicating a Possessory Interest

The length of delay in developing probable cause and securing a search authorization can transform a temporary seizure from one that affects no possessory interest into one that implicates a possessory interest.<sup>53</sup> Temporary seizures implicate a possessory interest when government agents seize a piece of property directly from its owner or when government agents seize property the owner has relinquished to a third party, and the owner anticipates regaining possession of the property at some point during the seizure period.<sup>54</sup> Temporary seizures may implicate possessory interests in situations where the seizure is based upon a reasonable suspicion<sup>55</sup> and those where the seizure is based upon probable cause.<sup>56</sup>

An example of a case where the duration of a temporary seizure based on reasonable suspicion implicated a possessory interest is *United States v. LaFrance*, a case from the Court of Appeals for the First Circuit.<sup>57</sup> In *LaFrance*, police officers in Lewiston, Maine, received anonymous reports that LaFrance was receiving illegal narcotics from Florida through the carrier Federal Express (FedEx).<sup>58</sup> At approximately 9:00 a.m. one morning, a FedEx employee informed police about a newly arrived overnight package addressed to LaFrance, and the police asked FedEx to hold the package until they could expose it to a drug-sniffing dog.<sup>59</sup> While FedEx guaranteed delivery by noon, based on past experience, LaFrance anticipated taking

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requirement to seek a search authorization from a civilian magistrate, and “as noted above, the period of detention to secure this warrant did not exceed the 7-day transit period during which appellant himself had agreed to be without possession of his goods.” *Id.* at 91.

<sup>47</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>48</sup> *See Visser*, 40 M.J. at 89–90.

<sup>49</sup> *See id.*

<sup>50</sup> *See Van Leeuwen*, 397 U.S. at 253; *see also Visser*, 40 M.J. at 89–90.

<sup>51</sup> *Van Leeuwen*, 397 U.S. at 252. The Court observed that “[t]heoretically . . . detention of mail could at some point become an unreasonable seizure of ‘papers’ or ‘effects’ within the meaning of the Fourth Amendment.” *Id.*

<sup>52</sup> *See Visser*, 40 M.J. at 90.

<sup>53</sup> *See Van Leeuwen*, 397 U.S. at 252.

<sup>54</sup> *See United States v. Place*, 462 U.S. 696, 705 (1983). “The intrusion on possessory interests occasioned by a seizure of one’s personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner.” *Id.*; *see also United States v. LaFrance*, 879 F.2d 1 (1st Cir. 1989).

<sup>55</sup> *LaFrance*, 879 F.2d at 4.

<sup>56</sup> *United States v. Martin*, 157 F.3d 46, 52 (2d Cir. 1998).

<sup>57</sup> *LaFrance*, 879 F.2d 1. Even though *LaFrance* has only persuasive authority in military courts, military courts have nevertheless relied upon its analysis. *See Visser*, 40 M.J. at 90.

<sup>58</sup> *LaFrance*, 879 F.2d at 3.

<sup>59</sup> *Id.* at 4. In *United States v. Place*, discussed later, the Supreme Court determined that a sniff-test by a trained narcotics dog does not constitute a search for Fourth Amendment purposes. *Place*, 462 U.S. at 707. The Court explained this by stating,

We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A “canine sniff” by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

delivery of packages by 11:00 a.m.<sup>60</sup> Because of police department inefficiency, the seizure continued beyond the noon deadline.<sup>61</sup> Since the case officer was off-duty and waiting for his wife to care for his infant son, and the drug-sniffing dog handler was also off duty and initially went to the wrong police station, the dog did not sniff the package until 1:15 p.m., seventy-five minutes after the guaranteed delivery time.<sup>62</sup> The sniff test took approximately one hour, during which time the dog alerted to the package and the agents established probable cause that it contained contraband.<sup>63</sup> Meanwhile, from 11:00 a.m. until the late afternoon, LaFrance called FedEx repeatedly, inquiring about the location of his package.<sup>64</sup> LaFrance argued for suppression of the evidence on grounds that the government detention of his package was too intrusive.<sup>65</sup> The court found that the seizure was reasonable, and the delay did not “approach[] the margins of the theoretical limit of reasonableness envisioned in *Van Leeuwen*.”<sup>66</sup>

Another example of a temporary seizure implicating a possessory interest is *United States v. Martin*,<sup>67</sup> a case from the Court of Appeals for the Second Circuit, which involved a seizure based upon probable cause. In *Martin*, police in Burlington, Vermont, suspected Martin, the owner of an airplane restoration and parts supply business, of stealing avionics equipment from a hanger adjacent to his.<sup>68</sup> When a purchaser of some of these parts discovered their listing in a stolen parts registry, he contacted Martin and demanded a refund, and Martin agreed to take the parts back.<sup>69</sup> The purchaser mailed two packages containing the stolen parts, via FedEx and United Parcel Service (UPS), back to Martin and then notified police in Burlington of the package tracking numbers.<sup>70</sup> Upon police request, UPS employees in Vermont held one of the packages on arrival.<sup>71</sup> Eleven days later, police finally received a search warrant for the package, and they discovered the stolen airplane parts while conducting the search two days after obtaining the warrant.<sup>72</sup> Martin argued that “the government waited too long both in securing a warrant to search the package and in conducting the search.”<sup>73</sup> The court decided that the Government acted reasonably.<sup>74</sup>

Because *LaFrance* and *Martin* involved different levels of suspicion, the courts’ analyses demonstrate a heightened scrutiny for temporary seizures based on reasonable suspicion but also show a relaxed standard for seizures implicating only a possessory interest. In considering the reasonableness of the temporary seizure in *LaFrance*, the court looked at three factors: diligence, timeliness, and information.<sup>75</sup> First, the court found that in establishing probable cause, police must demonstrate diligence that is “fairly characterized by steady, earnest, energetic, and attentive application and effort toward a predetermined end.”<sup>76</sup> The court tempered this standard by observing that while the police could have acted more expeditiously, their actions were reasonably diligent, because they “attempt[ed] to reduce any intrusion” by first arranging for the narcotics dog sniff test to establish probable cause and allowing enough time for the off-duty officers to be present for the test.<sup>77</sup> Second, the court looked to timeliness in relation to its impact on LaFrance’s possessory interests and reasoned that

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*Id.*

<sup>60</sup> *LaFrance*, 879 F.2d at 5–6.

<sup>61</sup> *See id.*

<sup>62</sup> *Id.* at 5.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 6–7.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> *United States v. Martin*, 157 F.3d 46 (2d Cir. 1998).

<sup>68</sup> *Id.* at 48.

<sup>69</sup> *Id.* at 49.

<sup>70</sup> *Id.* The purchaser mailed two packages to Martin—one on 11 December 1991 and the other on 16 December 1991. *Id.*

<sup>71</sup> *Id.* The package arrived at UPS in Vermont on 20 December 1991. *Id.*

<sup>72</sup> *Id.* Police obtained the search warrant on 31 December 1991 and searched the package on 2 January 1992. *Id.*

<sup>73</sup> *Id.* at 53.

<sup>74</sup> *Id.* at 54.

<sup>75</sup> *United States v. LaFrance*, 879 F.2d 1, 22–28 (1st Cir. 1989).

<sup>76</sup> *Id.* at 25.

<sup>77</sup> *Id.* at 23–24.

because the seizure did not affect LaFrance's liberty interests, the time he had to wait beyond the contractual delivery time was not unreasonable and did not outweigh the societal interest in crime prevention.<sup>78</sup> Third, the court considered whether the Government had an obligation to provide LaFrance with "information about where [the package] has been taken, for how long, and how it may be returned" and found this factor to be "insubstantial" where the owner relinquishes control of the property to a third party and the temporary seizure does not implicate a liberty interest (i.e., "the possessor's ability to travel").<sup>79</sup>

Similar to *LaFrance*, the court in *Martin*, which instead dealt with a probable cause seizure that extended for a much longer duration, also considered several factors in finding the temporary detention of a package to be reasonable.<sup>80</sup> First, the *Martin* Court looked at police diligence in obtaining a warrant.<sup>81</sup> The court found that because two weekends and Christmas occurred during the eleven-day seizure period, this "could explain the difficulty in promptly obtaining the warrant."<sup>82</sup> Second, the court examined the owner's privacy interest in the package and determined that by selling stolen parts to a third party, Martin assumed some risk that someone would reveal the contents of the package to authorities, thereby weakening his interest in the package.<sup>83</sup> Third, the court stated that because Martin had relinquished control of the property to a third party in the first place, the seizure was less intrusive.<sup>84</sup> Finally, just as in *LaFrance*, the court determined that "this is not a case where seizure of property would effectively restrain the liberty interests of the person from whom the property was seized, as is the case where officers seize a traveler's luggage and thereby cause 'disruption of his travel plans.'"<sup>85</sup>

While courts evaluate the impact of temporary seizures on a case-by-case basis, *LaFrance* and *Martin* demonstrate two critical factors for analyzing reasonableness: whether the Government was diligent in establishing probable cause or pursuing a search authorization and how the seizure's duration affected the property owner's liberty interests. For seizures based upon reasonable suspicion, government diligence involves putting forth a "steady, earnest, energetic, and attentive" effort to develop probable cause, even though this level of diligence may not be completely precise or efficient.<sup>86</sup> For probable cause seizures, the standard of diligence is more lenient in comparison to reasonable suspicion seizures, and courts may find any rational explanation for delay as excusable.<sup>87</sup> Finally, courts will consider strongly the fact that these seizures implicate no liberty interest, and this factor alone will weigh heavily in favor of the Government.<sup>88</sup>

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<sup>78</sup> *Id.* at 26.

<sup>79</sup> *Id.* at 28–29. In regard to whether the Government has an affirmative obligation to provide this information, the court stated,

Where the intrusion implicates only a possessory interest . . . that interest is usually unaffected by the place at which the seized article is kept and what one is told, so long as the object's condition is undisturbed. Only information about how long the detention may last is relevant, because only such information relates to the length of dispossession. We need not decide, once and for all, whether information imparted is a factor worthy of substantial consideration in a third-party seizure which implicates only possessory, not liberty, interests. In this case, the government asked FedEx to watch for the package, and then to hold it—nothing more. Contrary to the [lower] court's suggestion, there is no rule of law which placed the police under an obligation, at least in these early hours, to telephone the parcel's intended recipient and tell him the nature and cause of the delay.

*Id.* (citation omitted).

<sup>80</sup> *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Interestingly, the *Martin* court's only discussion about the Government's conduct in relation to the delay appears to be the theoretical idea that because two weekends and a holiday occurred during the eleven-day period, this "could explain the difficulty in promptly obtaining the warrant." *Id.* Nowhere does the court mention that the two weekends and the holiday did in fact cause any delay. See *id.* In addressing the Government delay, the court also stated, "[W]hile we would normally expect police officers to secure a search warrant in considerably less time than was taken here, under the particular circumstances present here, we can not say that the delay in securing the December 31, 1991 warrant was so 'unreasonable' as to violate the Fourth Amendment." *Id.* Likewise, in *United States v. Visser*, the court took the additional step of considering the reasonableness of the seven-day delay in obtaining a search warrant. *United States v. Visser*, 40 M.J. 86, 90–91 (C.M.A. 1994). The court's only mention of what might be construed as Government diligence was the fact that the Air Force investigator had to get a civilian search warrant to search household goods held by a commercial moving company off the installation. *Id.* at 90; see also *supra* note 43.

<sup>83</sup> *Martin*, 157 F.3d at 54.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See generally *United States v. LaFrance*, 879 F.2d 1, 23–28 (1st Cir. 1989). The *LaFrance* court emphasized this point when it stated that "[s]imply proving that more efficacious approaches were available does not prove that the method actually used was unreasonable." *Id.* at 15.

<sup>87</sup> While the Government's delay in securing a search warrant was reasonable in *Martin* and *Visser*, see *supra* note 77, a recent example of unreasonable Government delay is *United States v. Mitchell*. In this Eleventh Circuit Court of Appeals case, Immigration and Customs Enforcement (ICE) agents visited Mitchell's home in response to evidence that he had received electronic images of child pornography from a website. *United States v. Mitchell*, No. 08-10791, 2009 U.S. App. LEXIS 8258, at \*2–3 (11th Cir. Ga. Apr. 22, 2009). When Mitchell told them that one of his computers probably contained child



### C. Temporary Seizures Implicating a Possessory and Liberty Interest

A temporary seizure implicates both a possessory and liberty interest when government agents seize the owner's property (typically luggage), and this seizure effectively limits his ability to proceed with his travel plans or other activities because he must choose to remain with the seized property or arrange to get it back.<sup>89</sup> For temporary seizures based upon reasonable suspicion, the Supreme Court considers these to be a "Terry-type investigative stop"<sup>90</sup> requiring courts to look critically at the duration of the seizure to ensure that it is "so minimally intrusive as to be justifiable on reasonable suspicion."<sup>91</sup> Courts will impose a higher level of scrutiny for temporary seizures based upon reasonable suspicion than for those based upon probable cause.<sup>92</sup>

In *United States v. Place*,<sup>93</sup> the Supreme Court dealt with the government seizure of luggage initially based upon reasonable suspicion and later developing into probable cause. In this case, Drug Enforcement Agency (DEA) agents at the New York La Guardia Airport received a tip from law enforcement officers in Miami that Place might be transporting narcotics.<sup>94</sup> After Place arrived at La Guardia airport, claimed his two bags, and called a limousine, DEA agents approached

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pornography but refused to consent to a search, the agents removed the computer's central processing unit (CPU) and departed. *Id.* at \*3-4. Two and one-half days later, the lead agent left for a two-week training program and finally sought a search warrant three days after his return. *Id.* The court found this twenty-one day delay unreasonable after balancing Mitchell's possessory interest in the computer against the Government's justification for its delay in obtaining a search warrant. *Id.* at \*8-10.

First, the court determined that because computers are multi-use machines that may contain both contraband material and material of "exceptional value to its owner," the seizure had a significant impact on Mitchell's possessory interest. *Id.* at \*8. Second, the court observed that no agent can be certain that a computer contains authentic child pornography until an examination of the computer occurs. *Id.* at \*8-9. Meanwhile, even though the actual warrant application was brief, the lead agent made no effort to seek a search warrant prior to his departure for training. *Id.* Also, the ICE agent who accompanied the lead agent to Mitchell's home was familiar enough with the investigation to apply for a warrant in the lead agent's absence but failed to do so. *Id.* at \*9-10. Perhaps most significantly, the lead agent testified that he felt no sense of urgency to get a search warrant in light of Mitchell's acknowledgement that the computer contained child pornography. *Id.* at \*10.

The court also rejected the Government's argument that because the lead agent was the only agent in his federal district capable of conducting a forensic examination of Mitchell's computer, the delay in securing the warrant while the lead agent was away had no practical effect on Mitchell's possessory interest. *Id.* at \*10-11. The court found that as part of a nationwide investigation, ICE agents should have sought forensics assistance from someone outside the district in the lead agent's absence. *Id.* at \*12-13. The court indicated that if the Government had at least attempted to seek assistance during the lead agent's absence, it would have been more forgiving of "legitimate and practical reasons" for delay associated with finding help when law enforcement resources are limited. *Id.* at \*13 (citation omitted). However, the court was unwilling to excuse delay where "law enforcement officers simply believed that there was no rush." *Id.* at \*14-15.

<sup>88</sup> See *Martin*, 157 F.3d at 54; see also *LaFrance*, 879 F.2d at 28.

<sup>89</sup> *United States v. Place*, 462 U.S. 696, 708 (1983). Explaining how a seizure of luggage can also implicate a liberty interest, the Supreme Court stated,

The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.

*Id.*

<sup>90</sup> *Terry v. Ohio* concerned the temporary seizure of a person. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). In *Terry*, the Supreme Court stated, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. *Id.* In that case, the Supreme Court held,

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the *Fourth Amendment*, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

*Id.* at 30. For a discussion that *Terry*-type investigative stops do not require exigent circumstances, see *United States v. Hensley*, 469 U.S. 221, 228-29 (1985).

<sup>91</sup> *Place*, 462 U.S. at 708.

<sup>92</sup> See *Segura v. United States*, 468 U.S. 796, 812-13 (1984).

<sup>93</sup> *Place*, 462 U.S. 696 (1983).

<sup>94</sup> *Id.* at 698. According to the Court,

him, told him they suspected he was transporting narcotics, and requested consent to search his luggage.<sup>95</sup> According to the Court,

[w]hen Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agent's telephone numbers at which the agents could be reached. The agents then took the bags to Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approximately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a Magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.<sup>96</sup>

Claiming a violation of his Fourth Amendment rights, Place filed a motion to suppress the evidence.<sup>97</sup> The Supreme Court found the duration of the initial ninety-minute delay to be unreasonable and declared the evidence to be inadmissible.<sup>98</sup>

The Court in *Place* established the principle that government agents may briefly seize luggage directly from its owner "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion."<sup>99</sup> However, in permitting this intrusion, the Court also provided several critical factors to determine whether the duration of such a seizure is reasonable.<sup>100</sup>

First, the Court determined that although lawful temporary seizures that are "longer than the momentary ones" may be reasonable, "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."<sup>101</sup> The Court found that absent probable cause, the ninety-minute delay resulting from the seizure of Place's luggage was not sufficiently brief in this situation.<sup>102</sup> Second, the Court examined the Government's diligence in pursuing the investigation and questioned whether the agents efficiently used their time to arrange for additional investigative procedures.<sup>103</sup> Because the agents knew Place's arrival time at La Guardia Airport well in advance, they had adequate time to pre-arrange for the sniff test locally in order to minimize the intrusion, rather than removing the luggage and taking it to another airport.<sup>104</sup> Finally, the Court considered the

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Prompted by Place's parting remark that he had recognized that they were police, the [Miami] agents [who spoke with Place prior to his departure] inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place.

*Id.*

<sup>95</sup> *Id.* at 699.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 710.

<sup>99</sup> *Id.* at 702. The Supreme Court recognized the temporary seizure of Place's luggage to be similar to a temporary detention of a person during a *Terry* stop "on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime." *Id.* The Court used a balancing test to determine that "[w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *Id.* at 703. The Court then observed that temporary seizures could vary in degrees of intrusion from those where Government agents seize property the owner has relinquished to a third person to those where agents remove property directly from its owner. *Id.* at 705. Additionally, the Court approved of the Government's discretion to "confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog—or transport the property to another location." *Id.* at 705–06.

<sup>100</sup> *See id.* at 708–10.

<sup>101</sup> *Id.* at 709.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

government agents' failure to provide Place with information regarding his property.<sup>105</sup> The agents should have "inform[ed] [Place] of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion."<sup>106</sup> This ninety-minute delay, although not *per se* unreasonable, was unreasonable in this particular case.<sup>107</sup>

While the Supreme Court established a high standard for temporary seizures based upon reasonable suspicion that implicate a possessory and liberty interest, there is a lesser standard for probable cause seizures.<sup>108</sup> In *Segura v. United States*, the Court revisited *Place* in justifying delays associated with the probable cause seizure of an apartment.<sup>109</sup> In this case, New York Drug Enforcement Task Force agents temporarily seized an apartment from within and waited nineteen hours to obtain a search warrant because of an "administrative delay."<sup>110</sup> The apartment's occupants were in custody for the duration of the seizure.<sup>111</sup>

Because considerable delay in securing a warrant resulted from this seizure, the Court in *Segura* used it as an opportunity to elaborate on the delay in *Place* that occurred after agents established probable cause. In a footnote, the Court stated,

[I]n *United States v. Place* . . . we found unreasonable a 90-minute detention of a traveler's luggage. But the detention was based only on a suspicion that the luggage contained contraband, not on probable cause. After probable cause was established, authorities held the unopened luggage for almost three days before a warrant was obtained. It was not suggested that this delay presented an independent basis for suppression of the evidence eventually discovered.<sup>112</sup>

This interpretation of the three-day delay is somewhat problematic, because, as the dissent in *Segura* pointed out, the Court in *Place* "had no occasion to reach that issue" after it had already suppressed the evidence because of the length of the seizure when it was based upon reasonable suspicion.<sup>113</sup> However, case law supports lengthy delays resulting from temporary seizures when based upon probable cause and under similar circumstances.<sup>114</sup>

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<sup>105</sup> *Id.* at 710; see also *United States v. LaFrance*, 879 F.2d 1, 28 (1st Cir. 1989). With regard to the information factor, the court in *LaFrance* observed,

If accurate, information about where luggage has been taken, for how long, and how it may be returned, is important largely because it affects a liberty interest (the possessor's ability to travel); misinformation can obviously cause delay, disruption of routing and timing, or general inconvenience. Where the intrusion implicates only a possessory interest, however, that interest is usually unaffected by the place at which the seized article is kept and what one is told, so long as the object's condition is undisturbed. Only information about how long the detention may last is relevant, because only such information relates to the length of dispossession.

*Id.*

<sup>106</sup> *Place*, 462 U.S. at 710.

<sup>107</sup> See *id.*

<sup>108</sup> See generally *Segura v. United States*, 468 U.S. 796 (1984).

<sup>109</sup> See *id.* at 812–13.

<sup>110</sup> *Id.* at 801. A non-controversial subject was the idea that probable cause seizures, if conducted from the outside of the apartment, do not require exigent circumstances. See *id.* at 804, 824 n.15.

<sup>111</sup> *Id.* at 801. This primer is not intended to address all of the vast nuances of *Segura v. United States*. The Court provided the principle of this case when it stated,

[W]e hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.

*Id.* at 798.

<sup>112</sup> *Id.* at 824 n.8.

<sup>113</sup> *Id.* at 813 n.14 (Stevens, J., dissenting).

<sup>114</sup> *United States v. Jodoin*, 672 F.2d 232 (1st Cir. 1982); see also *United States v. Respress*, 9 F.3d 483 (6th Cir. 1993). In *Respress*, an airport narcotics officer identified Respress as fitting the drug courier profile, questioned him about his travel plans, and requested consent to search his luggage, which Respress refused. *Id.* at 484. When Respress departed the airport without his luggage rather than proceeding on his connecting flight, the agent located and stopped him in a taxicab. *Id.* at 485. When Respress again provided inconsistent answers to the agent's questions, attempted to hide his ticket, and refused the agent's request to search his luggage, the agent obtained a search warrant the next day—ten hours after seizing his luggage from the airport. *Id.* The search revealed 2.8 kilograms of cocaine in Respress's suitcase. *Id.* After explaining why Respress's behavior established probable cause, the court found that the delay in securing the search warrant was reasonable. *Id.* at 487–88. Interestingly, while discussing the significance of probable cause in justifying

For instance, in *United States v. Jodoin*, federal DEA agents at a Florida airport observed that Jodoin's behavior matched the profile of a drug courier, so they contacted DEA agents in Boston (Jodoin's destination) who met up with Jodoin at his arrival terminal at Logan Airport.<sup>115</sup> After Boston DEA agents approached Jodoin and noticed more suspicious behavior, they requested consent to search his suitcase, which he refused.<sup>116</sup> Upon request, Jodoin agreed to accompany the agents to the airport DEA office where the agents told him they wanted to expose his luggage to a drug dog sniff test.<sup>117</sup> The agents did not place Jodoin under arrest, but they did keep his suitcase and tell him he was free to leave their office.<sup>118</sup> The next day, a drug dog sniffed the suitcase but did not alert to the presence of drugs.<sup>119</sup> Three days later, a magistrate granted a search warrant for the suitcase, based primarily on information obtained prior to the sniff test and on an informant's statement.<sup>120</sup> The search revealed that Jodoin was transporting several pounds of cocaine.<sup>121</sup> The court rejected Jodoin's claim that DEA agents acted unconstitutionally in detaining his luggage.<sup>122</sup>

After deciding the agents were justified in conducting a brief investigatory stop of Jodoin in the airport, the First Circuit held that the agents had probable cause to believe his suitcase was an instrumentality of a crime.<sup>123</sup> The court then determined that because the agents based their temporary seizure of the suitcase on probable cause, analyzing the reasonableness of the three-day delay in obtaining a search warrant was unnecessary.<sup>124</sup> The court stated,

Because these facts satisfy the higher standard of "belief," we need not consider whether because of the length of time of the detention of the suitcase, it would have been unlawful if supported only by "reasonable suspicion"—an issue which, while not specifically raised here, has bothered the courts of appeals for other circuits.<sup>125</sup>

In other words, the court ceased to analyze the reasonableness of the three-day delay as soon as it found probable cause.<sup>126</sup> This supports the Supreme Court's notion in *Segura* that the three-day delay in *Place* occurring after government agents established probable cause was in fact reasonable.<sup>127</sup>

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temporary seizures, the court mentioned that "the [Supreme] Court's decision in *Place* would have been unnecessary had there been probable cause to seize the defendant's suitcase, because seizures based on probable cause have long been lawful." *Id.* at 486.

<sup>115</sup> *Jodoin*, 672 F.2d at 233.

<sup>116</sup> *Id.* at 234. When Jodoin arrived at the airport, one agent testified that he appeared to be nervous, as he stopped on several occasions to "scan[] the area." *Id.* at 233–34. As further evidence of this suspicious behavior, the court stated,

When Jodoin left the baggage claim area, the agents approached him. Marchand identified himself as a DEA agent and asked Jodoin whether he could speak to him for a minute. Jodoin answered, "sure." Marchand asked him for his name, identification and where he was traveling from. Jodoin said his name was "Peter Jodoin" (not Paul Harper [a name he previously provided to Florida DEA agents]). He said he was returning from Fort Lauderdale where he had stayed with friends for a few days (not 17 hours [as indicated by his flight itinerary]). He added that he had left his clothing in Florida (although he carried a suitcase). He told the agents he had no identification and that he had thrown his ticket away. When agent Marchand asked him whether the suitcase he was carrying was his, he replied, "I don't know." He then said it was not his. The agents stated that Mr. Jodoin was nervous and that "perspiration began to form above his upper lip."

*Id.* at 234.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Although the dog did not alert to the luggage, the DEA agents "obtained a warrant to search the suitcase—on the basis of the information [mentioned previously], along with an agent's statement that an informant had told a different agent that appellant had associated with known drug dealers." *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 235.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* One of the other circuits that was bothered by similar cases dealing with reasonable suspicions seizures at the time was *United States v. Place* when it was in the Court of Appeals for the Second Circuit. See *id.* No controversy surrounded the *Jodoin* decision, however. *United States v. Respress*, 9 F.3d 483, 488 (6th Cir. 1993).

<sup>126</sup> *Jodoin*, 672 F.2d at 235.

<sup>127</sup> See *Segura v. United States*, 468 U.S. 796, 824 n.8 (1984).

For temporary seizures implicating a possessory and liberty interest, *Place* and its interpretation in *Segura* demonstrate the dichotomy between the standard of reasonableness for seizures based upon reasonable suspicion and those based upon probable cause. In both cases, courts will determine reasonableness in light of the seizure's duration and how diligently the Government used the delay.<sup>128</sup> Where reasonable suspicion justifies the brief investigatory detention, government agents must diligently establish probable cause before the delay amounts to an unreasonable disruption in the owner's travel plans.<sup>129</sup> Where probable cause justifies the temporary seizure, however, government agents are no longer looking to dispel any suspicions with regard to the property.<sup>130</sup> In fact, once probable cause exists, a search authorization should be forthcoming, and the property owner's liberty interests in relation to the property should be a moot concern.<sup>131</sup> At that point, the duration of the delay in obtaining the search authorization must still be reasonable.<sup>132</sup> However, reasonable delay in probable cause cases may last hours or even days as opposed to a significantly shorter period—perhaps a matter of minutes—in reasonable suspicion cases.<sup>133</sup>

### III. Conclusion

The framework for temporary seizures under the Fourth Amendment represents a balance between two competing interests.<sup>134</sup> On one side is the Government's desire to use temporary seizures as a tool to maintain the status quo while moving forward with the investigation.<sup>135</sup> On the other side is the owner's interest in avoiding government interference with the possession of his property.<sup>136</sup> Meanwhile, the principle of reasonableness weighs against both of these interests to create the proper balance.<sup>137</sup> The Government demonstrates the reasonableness of a particular temporary seizure by diligently developing probable cause and seeking a search authorization during the seizure period.<sup>138</sup>

By initiating a temporary seizure, government agents bear the responsibility to proactively gather vital pieces of information in order to understand whether reasonable suspicion or probable cause exists with regard to the property and how the seizure affects the property owner's interests.<sup>139</sup> This information consequently triggers the level of diligence required in developing probable cause and seeking a search authorization with regard to the property.<sup>140</sup>

The duration of a particular seizure in itself does not make a temporary seizure unreasonable.<sup>141</sup> However, armed with the proper analytical tools, a government agent should prepare for and execute a temporary seizure in a conscientious manner, as if a clock were ticking.<sup>142</sup> The appendix to this primer presents such a tool. For a temporary seizure based upon probable cause, the agent must progress methodically.<sup>143</sup> For a temporary seizure based upon a reasonable suspicion that implicates a possessory interest and more, the agent must move efficiently and swiftly.<sup>144</sup> Demonstrating the appropriate

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<sup>128</sup> See *United States v. Place*, 462 U.S. 696, 708–10 (1983).

<sup>129</sup> See *id.* Clearly, some disruption to a person's travel plans may be reasonable.

<sup>130</sup> See generally *Jodoin*, 672 F.2d at 235.

<sup>131</sup> See generally *id.* In other words, if a search warrant is forthcoming, the property owner should expect to lose possession of his property at least until the resolution of his case, regardless of his liberty interests.

<sup>132</sup> *United States v. Respress*, 9 F.3d 483 (6th Cir. 1993).

<sup>133</sup> See *Segura v. United States*, 468 U.S. 796, 812–13 (1984).

<sup>134</sup> See *id.* at 808.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See generally *id.*

<sup>138</sup> See generally *United States v. Place* 462 U.S. 696, 709 (1983).

<sup>139</sup> See generally *id.* at 709–10.

<sup>140</sup> See generally *United States v. Jodoin*, 672 F.2d. 232, 235 (1st Cir. 1982).

<sup>141</sup> See *Place*, 462 U.S. at 709–10.

<sup>142</sup> See generally *id.*

<sup>143</sup> See generally *United States v. Visser*, 40 M.J. 86, 90–91 (C.M.A. 1994).

<sup>144</sup> See *Place*, 462 U.S. at 709–10; see also *United States v. LaFrance*, 879 F.2d 1, 25 (1st Cir. 1989).

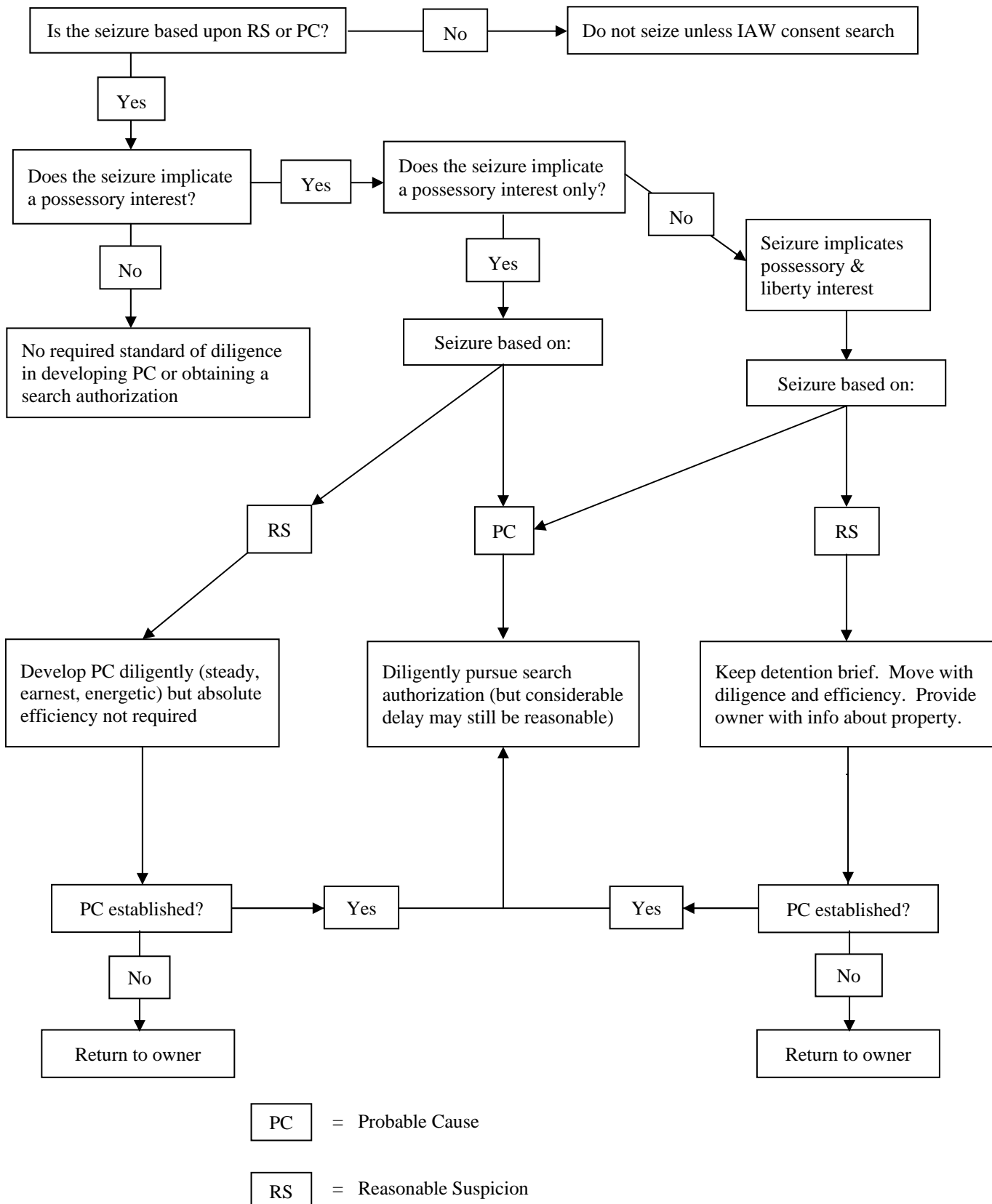
diligence during temporary seizures, government agents maintain the balance between “society’s interest in the discovery and protection of incriminating evidence from removal or destruction” and “a person’s possessory interest in property.”<sup>145</sup> Using the proper framework, government agents can use temporary seizures to their advantage while respecting Fourth Amendment protections.

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<sup>145</sup> *Segura v. United States*, 468 U.S. 796, 808 (1984).

## Appendix

### Temporary Seizure Flow Chart



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